JANA DCS Sdn Bhd v TAR PH Family Entertainment Sdn Bhd and other cases

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NOS BA-24–30–09 OF 2019, BA-24–31–09 OF 2019 AND BA-24–32–09 OF 2019
FAIZAH JAMALUDIN J
30 JUNE 2021

Civil Procedure — Injunction — Interim injunction — Plaintiff applied for Mareva injunction pending disposal of arbitral proceedings — Whether High Court had jurisdiction to grant injunction pending disposal of arbitral proceedings — Whether High Court's power to grant interim reliefs limited to arrests of ships, bail or security under admiralty jurisdiction — Whether power conferred to arbitral tribunals to order interim measures had effect of stripping High Court's jurisdiction to grant interim measures — Arbitration Act 2005 s 11(1)

These are applications by the plaintiff, for mareva injunctions against the defendants in the Amended Originating Summons No BA-24–30–09 of 2019 ('OS 30'), BA-24–31–09 of 2019 ('OS 31') and BA-24–32–09 of 2019 ('OS 32') (collectively referred as 'the OSs'), to restrain the defendants in each OS from removing from Malaysia or otherwise from dissipating any of its assets in Malaysia up to the value of RM100m pending the final determination of the arbitral proceedings initiated and maintained by the plaintiff against each of the defendants under three separate agreements between the plaintiff and each of the defendants entitled 'Agreement for the Implementation of a District Cooling System' ('DCS agreements'). It was agreed by counsel for the plaintiff and counsel for the defendants, that counsels would submit on the issue of the High Court's jurisdiction to hear the plaintiff's applications for the Mareva injunctions in the OSs. It was also agreed that the court would first deliver its ruling on the question of the High Court's jurisdiction to grant a Mareva injunction against the defendants under s 11(1)(c) of the Arbitration Act 2005 ('the AA 2005') pending the disposal of arbitral proceedings between the parties before an arbitral tribunal. It was further agreed that if the court ruled that the High Court had the jurisdiction to hear the plaintiff's application pending the arbitral proceedings, the court would proceed with the substantive hearing of the plaintiff's application in the OSs on its merits. And if the court ruled that the High Court did not have the requisite jurisdiction, it would dismiss the plaintiff's application for the Mareva injunctions in all three OSs on the grounds of its lack of jurisdiction. The issues for determination of the court were: (a) whether the High Court had the jurisdiction to grant a Mareva injunction pending the disposal of arbitral proceedings; (b) whether the High Court's power to grant interim reliefs in relation to arbitral proceedings was

limited to arrests of ships, bail or security under its admiralty jurisdiction; and (c) whether the power conferred to arbitral tribunals to order interim measures had the effect of stripping the High Court of its jurisdiction to grant interim measures under s 11(1) of the Arbitration Act 2005 ('the AA 2005'). A

Held, ruling that the High Court had jurisdiction to hear the plaintiff's applications: B

(1) The court was unable to agree with the defendant's argument that the extension of the High Court's power to grant interim reliefs for arbitral proceedings pursuant to its admiralty jurisdiction restricted or confined the High Court's power to grant interim relief under s 11(1)(c) of the AA 2005 to arrests, bail or other security under its admiralty jurisdiction only. From the plain reading of s 11(1) of the AA 2005, as amended by the Arbitration (Amendment) Act 2011 ('2011 Amendment Act') and the Arbitration (Amendment) Act (No 2) Act 2018 ('2018 Amendment Act'), the extension of the High Court's power to arrest ships as security for arbitral proceedings under its admiralty jurisdiction did not cancel or strip its power to grant interim reliefs for arbitral proceedings under its civil jurisdiction. Pursuant to established principles of statutory interpretation, it would be wrong to conclude that the extension of the High Court's jurisdiction to grant interim relief for arbitral proceedings under its admiralty jurisdiction meant the removal of its jurisdiction to grant interim relief for arbitral proceedings under its civil jurisdiction, without any express provisions in the AA 2005 to that effect. The High Court retained its power to grant interim reliefs under its civil jurisdiction as a means of preserving assets for the purpose of satisfying awards which may be made in arbitral proceedings (see paras 30–31). C D E F

(2) Without any express provisions to that effect, it would be wrong to impute into the AA 2005 that the power given to arbitral tribunals to grant interim measures in s 19(2) of AA 2005 replaced or was in lieu of the High Court's powers in s 11(1) of the AA 2005 to grant interim measures before or during arbitral proceedings. As could be seen from s 19(1) of the AA 2005, an arbitral tribunal's power to grant interim measures, including Mareva injunctions, was subject to the request by one of the parties to the arbitral proceedings and the condition that the parties do not agree otherwise. The court found that the High Court's power to grant interim measures for preserving assets before or during arbitral proceedings was not limited to the arrests of ships, bail or security pursuant to its admiralty jurisdiction. Such power included the discretion to grant other interim measures pursuant to its civil jurisdiction under the Courts of Judicature Act 2004 ('the CJA'), including the power to grant Mareva injunctions for purposes of G H I

A preservation of property out of which a subsequent arbitration award may be satisfied before or during arbitral proceedings (see paras 34–35 & 37).

[Bahasa Malaysia summary

B Ini adalah permohonan plaintif untuk injunksi mareva terhadap defendan di dalam Saman Pemula terpinda No BA-24–30–09 2019 ('SP 30'), BA-24-31–09 Tahun 2019 ('SP 31') dan BA-24–32–09 Tahun 2019 ('SP 32') (secara kolektif dirujuk sebagai 'SP'), untuk menghalang defendan-defendan di setiap SP daripada mengeluarkan atau melupuskan dari Malaysia atau C sebaliknya mana-mana asetnya di Malaysia sehingga nilai RM100 juta sementara menunggu pelupusan prosiding timbang tara yang difailkan oleh plaintif terhadap setiap defendan di bawah tiga perjanjian berasingan antara plaintif dan setiap defendan bertajuk 'Perjanjian untuk Pelaksanaan Sistem D Penyejukan Bahagian' ('perjanjian DCS'). Perkara yang dipersetujui peguamcara plaintif dan peguamcara defendan adalah peguamcara akan mengemukakan isu bidang kuasa Mahkamah Tinggi untuk mendengar permohonan plaintif untuk injunksi Mareva dalam SP. Perkara lain yang dipersetujui adalah mahkamah akan menyampaikan keputusannya terlebih E dahulu mengenai persoalan bidang kuasa Mahkamah Tinggi untuk memberikan injunksi Mareva terhadap defendan di bawah s 11(1)(c) Akta Timbang Tara 2005 ('ATT 2005') sementara menunggu pelupusan prosiding timbang tara antara pihak-pihak di hadapan tribunal timbang tara. Ia seterusnya dipersetujui bahawa sekiranya mahkamah memutuskan bahawa F Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar permohonan plaintif sementara menunggu prosiding timbang tara, mahkamah akan meneruskan pendengaran substantif permohonan plaintif di dalam SP untuk meritnya. Sekiranya mahkamah memutuskan bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa, mahkamah akan menolak permohonan plaintif G untuk injunksi Mareva dalam ketiga-tiga SP atas alasan kekurangan bidang kuasanya. Isu-isu untuk penentuan mahkamah ini adalah: (a) sama ada Mahkamah Tinggi mempunyai bidang kuasa untuk membenarkan injunksi Mareva sementara menunggu pelupusan prosiding timbang tara; (b) sama ada kuasa Mahkamah Tinggi untuk memberikan pelepasan interim berhubung H dengan prosiding timbang tara adalah terhad kepada penahanan kapal, ikat jamin atau keselamatan di bawah bidang kuasa admiral; dan (c) sama ada kuasa yang diberikan kepada tribunal timbang tara untuk memerintahkan langkah-langkah interim mempunyai kesan pelucutan bidang kuasa Mahkamah Tinggi untuk memberikan langkah-langkah interim di bawah I s 11(1) Akta Timbang Tara 2005 ('ATT 2005').

Diputuskan, Mahkamah Tinggi mempunyai bidang kuasa untuk mendengan permohonan-permohonan plaintif:

(1) Mahkamah ini tidak dapat bersetuju dengan hujah defendan bahawa

lanjutan kuasa Mahkamah Tinggi untuk memberikan pelepasan interim untuk prosiding timbang tara menurut bidang kuasa admiral mengehadkan kuasa Mahkamah Tinggi untuk mendapatkan pelepasan interim di bawah s 11(1)(c) AA 2005 untuk menangkap, jaminan atau keselamatan lain di bawah bidang kuasa admiralnya. Dari penelitan s 11(1) ATT 2005, seperti yang dipinda oleh Akta Timbang Tara (Pindaan) 2011 ('2011 Akta Pindaan') dan Akta Timbang Tara (Pindaan) (No 2) 2018 (Akta Pindaan 2018), lanjutan kuasa Mahkamah Tinggi dalam menahan kapal sebagai jaminan untuk prosiding timbang tara di bawah bidang kuasa admiralnya tidak membatalkan atau melucutkan kuasanya untuk memberikan pelepasan interim untuk prosiding timbang tara di bawah bidang kuasa sivilnya. Menurut prinsip-prinsip tafsiran berkanun yang ditetapkan, adalah salah untuk menyatakan bahawa pelanjutan bidang kuasa Mahkamah Tinggi memberikan pelepasan interim bagi prosiding timbang tara di bawah bidang kuasa admiralnya bermaksud perlucutan bidang kuasanya untuk memberikan pelepasan interim bagi prosiding timbang tara di bawah bidang kuasa sivilnya, tanpa sebarang peruntukan nyata dalam ATT 2005 untuk tujuan tersebut. Mahkamah Tinggi mengekalkan kuasanya untuk memberikan pelepasan interim di bawah bidang kuasa sivilnya sebagai cara untuk memelihara aset bagi membolehkan awad dapat dilaksanakan di dalam prosiding timbang tara (lihat perenggan 30–31).

(2) Tanpa mana-mana peruntukan yang nyata, adalah salah untuk menyatakan ATT 2005 memberikan kuasa kepada tribunal timbang tara untuk memberikan langkah-langkah interim dalam s 19(2) ATT 2005 untuk menggantikan kuasa Mahkamah Tinggi seperti yang diperuntukkan di dalam s 11(1) ATT 2005 yang membolehkan Mahkamah Tinggi memberikan langkah-langkah interim sebelum atau semasa prosiding timbang tara. Seperti yang dapat dilihat dari peruntukan s 19(1) ATT 2005, kuasa tribunal timbang tara untuk memberikan langkah-langkah interim, termasuk injunksi Mareva, adalah tertakluk kepada permohonan oleh salah satu pihak kepada prosiding timbang tara dan syarat bahawa pihak-pihak tidak bersetuju sebaliknya. Mahkamah mendapati bahawa kuasa Mahkamah Tinggi untuk memberikan langkah-langkah interim untuk memelihara aset sebelum atau semasa prosiding timbang tara tidak terhad kepada penahanan kapal, jaminan atau keselamatan menurut bidang kuasa admiralnya. Kuasa tersebut termasuk budi bicara untuk memberikan langkah-langkah interim lain menurut bidang kuasa sivilnya di bawah Akta Mahkamah Kehakiman 2004 ('AMK'), termasuk kuasa untuk memberikan injunksi Mareva untuk tujuan pemeliharaan harta yang mana awad timbang tara boleh dilaksanakan sebelum atau semasa prosiding timbang tara (lihat perenggan 34–35 & 37).]

Cases referred to

Andria, The (renamed the Vasso) [1984] QB 477, CA (refd)
Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1; [2020] 3 CLJ 153; [2020] 2 AMR 517, FC (refd)
Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd [2019] 4 MLJ 614; [2019] 4 CLJ 131, FC (refd)
Rena K, The [1979] 1 All ER 397, QBD (refd)

Legislation referred to

Administration of Justice Act 1959 [UK]
Arbitration Act 2005 ss 11(1), 11(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h), 19, 19(1), (2), (2)(c)
Courts of Judicature Act 1964 ss 3, 24, 67, 67(1)
Supreme Court Act 1981 [UK] ss 20, 21

Liew Teck Huat (Lim Qi Si and Romario Jono with him) (Suflan TH Liew & Partners) for the plaintiff.
Sanjay Mohan (Tan Jun Ling with him) (Sanjay Mohan) for the defendants.

Faizah Jamaludin J:

INTRODUCTION

[1] These are applications by the plaintiff, JANA DCS Sdn Bhd, for Mareva injunctions against the defendants in the amended Originating Summons No BA-24–30–09 of 2019 ('OS 30'), BA-24–31–09 of 2019 ('OS 31') and BA-24–32–09 of 2019 ('OS 32') (collectively referred to herein as 'the OSs'), to restrain the defendants in each OS from removing from Malaysia or otherwise from dissipating any of its assets in Malaysia up to the value of RM100m pending the final determination of the arbitral proceedings initiated and maintained by the plaintiff against each of the defendants under three separate agreements between the plaintiff and each of the defendants entitled 'Agreement for the Implementation of a District Cooling System' (referred to collectively as the 'DCS agreements').

[2] The defendants in the OSs are TAR PH Family Entertainment (in OS 30), PH Marina Boulevard Sdn Bhd (in OS 31) and TAR PH Sdn Bhd (in OS 32). They are related companies and are subsidiaries of Khazanah Nasional Berhad.

[3] All three OSs were heard together. At the hearing of the applications on 31 March 2021, it was agreed by counsel for the plaintiff and counsel for the defendants, that counsels will submit on the issue of the High Court's

jurisdiction to hear the plaintiff's applications for the Mareva injunctions in the OSs. It was also agreed that this court will first deliver its ruling on the question of the High Court's jurisdiction to grant a Mareva injunction against the defendants under s 11(1)(c) of the Arbitration Act 2005 ('the AA 2005') pending the disposal of arbitral proceedings between the parties before an arbitral tribunal. It was further agreed that if this court rules that the High Court has the jurisdiction to hear the plaintiff's application pending the arbitral proceedings, this court will proceed with the substantive hearing of the plaintiff's application in the OSs on its merits. And if this court rules that the High Court does not have the requisite jurisdiction, it will dismiss the plaintiff's application for the Mareva injunctions in all three OSs on the grounds of its lack of jurisdiction.

[4] For the reasons set out herein, this court ruled that the High Court does have the requisite jurisdiction to hear and to grant the plaintiff's application for Mareva injunctions in the OSs pending the disposal of arbitral proceedings between the parties before an arbitral tribunal.

[5] However, before the matter could proceed to the substantive hearing of the plaintiff's application in the OSs on its merits, the defendants filed an appeal to the Court of Appeal on this court's ruling on the issue of the High Court's jurisdiction.

[6] In light of the recent decisions of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1; [2020] 3 CLJ 153; [2020] 2 AMR 517 and *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614; [2019] 4 CLJ 131, the question is does the Court of Appeal have the jurisdiction to hear the defendants' appeal of this court's ruling on its jurisdiction to hear the plaintiff's applications prior to the court's final decision on the substantive applications in the OSs?

[7] The Federal Court in *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1; [2020] 3 CLJ 153; [2020] 2 AMR 517, in its majority decision, held that the right of appeal in civil matters under s 67 of the Courts of Judicature Act 1964 ('the CJA') is subject to the definition of 'decision' in s 3 of the CJA, which excludes rulings made in the course of a trial or hearing that does not finally dispose of the rights of the parties.

[8] Section 67 of the CJA states that the Court of Appeal has the jurisdiction to determine appeals from any 'judgment' or 'order' of the High Court. The

word 'decision' is not expressly used in s 67 of the CJA. However, the words 'judgment' or 'order', though not defined in the CJA, are included in the definition of 'decision' in s 3 of the CJA. Section 3 of the CJA defines 'decision' to mean 'judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties'.

[9] In *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614; [2019] 4 CLJ 131, the Federal Court held that the exception in s 3 of the CJA, which excludes 'ruling' from the meaning of 'decision' should be extended to s 67(1) of the CJA. Zainun Ali FCJ delivering the judgment of the Federal Court held:

> [31] In the absence of the word 'decision' in sub-s 67(1) of the CJA, the question is whether the phrase 'judgment or order' mentioned in sub-s 67(1) of the CJA is a 'decision' within the context of s 3 of the CJA. Putting it in another way, the question is whether the exception provided in s 3, which excludes a 'ruling' from the meaning of decision, should be extended to s 67(1), thus restricting any appeal to be filed against any ruling of the High Court?
>
> [32] It bears repeating that the words 'judgment' and 'order' are not defined in s 3 of the CJA. Nevertheless they appear in s 3, to form the meaning of 'decision'. The omission of the word 'decision' in sub-s 67(1) of the CJA is capable of being understood. Section 3 says that 'decision' means judgment, sentence or order ...'. It is seen that by the words 'judgment' and 'order', sub-s 67(1) indicates the form a 'decision' will take in s 3 of the CJA where the word 'sentence' is absent. This is appropriate since a civil court does not impose a sentence in its decision. A sentence is a decision given by a judge sitting in a criminal court upon conviction of a criminal charge. Thus the words in sub-s 67(1) are clear and unambiguous and the court must give effect to its meaning.

[10] The Federal Court in its majority judgment in *Asia Pacific Higher Learning* expressed its agreement with its earlier judgment in *Kempadang* that s 3 of the CJA applies to civil appeals. Azahar Mohamed CJ (Malaya) delivering the supporting judgment of the Federal Court *Asia Pacific Higher Learning* held:

> [9] Hence, the uncertainty on whether s 3 applied to civil appeals in the absence of the word 'decision' in s 67(1) has been laid to rest in *Kempadang* where the Federal Court held that the principles underlying the application of s 3 in criminal appeals were applicable in civil appeals.
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> ...
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> [11] *The decision (in Kempadang) is a clear authority to support the proposition that s 67(1) read with ss 3 and 68(1) of the CJA precluded a litigant's right of appeal against a High Court decision in an amendment application made in the course of trial that does not finally dispose of the rights of parties.* Otherwise, it would allow parties in civil matters to circumvent the restrictions imposed by the definition of 'decision' in s 3

of the CJA and thereby appeal against every decision of trial court, which would indisputably delay the administration of justice. The intention of the Legislature is clear on the matter. It is to limit and filter the number of appeals to the Court of Appeal. What it means in practice is that it is intended to filter appeals so as to prevent the appellate courts from being inundated with appeals and to prevent delays to the administration of justice. The legislative provisions are likewise clear in precluding from appeals decisions made in the course of trial and which do not finally dispose of the rights of parties. It has to be noted here that an aggrieved party would not be prejudiced by the filtering effect of s 3 of the CJA as it would still be open to the aggrieved party to raise the offending ruling in the appeal proper at the conclusion of the entire trial (see *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293).

...

[19] For the foregoing reasons, the decision made by the High Court in the amendment application was not appealable. As the decision of the High Court in the amendment application was not appealable, the Court of Appeal had no jurisdiction to hear and determine the appeal. It committed a jurisdictional error when it heard the appeal. The respondent's appeal against the decision of the High Court was therefore incompetent and not properly brought before the Court of Appeal ... (Emphasis added.)

[11] This court's ruling on whether it has the jurisdiction to hear the plaintiffs' applications for the Mareva injunctions in the OSs pending the disposal of arbitral proceedings between the parties before an arbitral tribunal, is a 'ruling' made in the course of a hearing of the OSs — it not a decision that finally disposes of the rights of the parties in respect of the plaintiffs applications for Mareva injunctions in the OSs.

[12] Accordingly, based on ss 3 and 67 of the CJA and the Federal Court's judgments in *Kempadang* and *Asia Pacific Higher Learning*, the answer to the question posed above is that the Court of Appeal does not have the jurisdiction to hear the defendant's appeal of this court's ruling on the issue of the High Court's jurisdiction to grant the plaintiff's applications for the Mareva injunctions in the OSs. As Azahar Mohamed CJ (Malaya) observed in *Asia Pacific Higher Learning*, the aggrieved party is not prejudiced as it can appeal against this court's ruling on its jurisdiction in the appeal proper at the conclusion of the substantive hearing of the plaintiff's applications for the Mareva injunctions in the OSs.

[13] Nevertheless, notwithstanding the issue as regards the Court of Appeal's jurisdiction to hear the defendants' appeal on this court's ruling on the High Court's jurisdiction, prior to the substantive hearing of the OSs and this court's final decision on the plaintiff's application for the Mareva injunctions, I set out in this 'Grounds of Judgment' the full reasons for this court's ruling as regards its jurisdiction to grant Mareva injunctions pending the disposal of arbitral

proceedings between the parties before an arbitral tribunal.

DOES THE HIGH COURT HAVE THE JURISDICTION TO GRANT A MAREVA INJUNCTION PENDING THE DISPOSAL OF ARBITRAL PROCEEDINGS?

[14] The defendants contend that the High Court does not have the requisite jurisdiction to grant the plaintiff's applications for the Mareva injunctions against the defendants pending the disposal of arbitral proceedings between them before an arbitral tribunal.

[15] The defendants' case is that the High Court's power to grant interim reliefs in respect of arbitral proceedings: (i) is confined to the powers conferred on it in s 11(1)(a) to (e) of the Arbitration Act 2005 ('the AA 2005'); (ii) such interim reliefs do not include Mareva injunctions because the power to grant interim measures for the preservation of assets lies with the arbitral tribunal pursuant to s 19(2)(c) of the AA 2005; and (iii) the High Court's power to grant an interim relief for the preservation of assets under s 11(1)(c) of the AA 2005 is limited to arrests of ships, bail or security under its the admiralty jurisdiction.

[16] Learned counsel for the plaintiff disagrees. The plaintiff's position is that the High Court does have the jurisdiction to grant Mareva injunctions in respect of arbitral proceedings under s 11(1)(c) of AA 2005 and that such power is not limited to the High Court's admiralty jurisdiction.

IS THE HIGH COURT'S POWER TO GRANT INTERIM RELIEFS IN RELATION TO ARBITRAL PROCEEDINGS UNDER S 11(1)(C) LIMITED TO ARRESTS OF SHIPS, BAIL OR SECURITY UNDER ITS ADMIRALTY JURISDICTION?

[17] One the defendant's grounds as to why the High Court does not have the power to grant Mareva injunctions is because the High Court's power to grant interim relief for the preservation of assets under s 11(1)(c) of AA 2005 is limited to arrests of ships, bail or security under its the admiralty jurisdiction.

[18] Section 11(1)(c) of the AA 2005 states:

> 11 Arbitration agreement and interim measures by High Court
>
> (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to —
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> ...
>
> (c) provide a means of preserving assets out of which a subsequent award may be

satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court; A

[19] In determining the merit of the argument put forward by the defendant, it is necessary for this court to first examine the High Court's admiralty jurisdiction. B

The High Court's Admiralty Jurisdiction

[20] The High Court's admiralty jurisdiction is derived from s 24 of the CJA, which states as follows: C

> Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include —
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> ...
>
> (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981; D

[21] The English High Court's admiralty jurisdiction is contained in ss 20 and 21 of the United Kingdom's Supreme Court Act 1981 ('the SCA 1981'). E

[22] The United Kingdom is a signatory to the 'The International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels 1952' (commonly referred to as the 'Arrest Convention'). The SCA 1981 gives effect to the Arrest Convention, as did the earlier UK's Administration of Justice Act 1959, which was repealed and replaced by the SCA 1981. F

[23] Whilst Malaysia is not a signatory to Arrest Convention, by reason of s 24 of the CJA, the UK's admiralty jurisdiction (including the provisions of the Arrest Convention as contained in the SCA 1981) is incorporated into the Malaysian High Court's civil jurisdiction. G

[24] The AA 2005 was first amended by the Arbitration (Amendment) Act 2011 ('the 2011 Amendment Act') to allow for the arrest of ships as security for arbitration proceedings in Malaysia. H

[25] Prior to the amendment by the 2011 Amendment Act, a ship cannot be arrested as security for arbitration proceedings in Malaysia, unless the plaintiff can satisfy the court pursuant to the principles promulgated by the English High Court in *The Rena K* [1979] 1 All ER 397. This is because the English High Court's admiralty jurisdiction to issue a warrant of arrest may only be exercised in support of the court's jurisdiction 'to hear and determine a I

maritime claim', and not if the substantive claim is being determined through arbitration proceedings instead of the High Court. In English Court of Appeal case of *The Andria (renamed the Vasso)* [1984] QB 477, Robert Goff LJ explained the principle as follows:

> ... *on the law as it stands at present, the court's jurisdiction to arrest a ship in an action in rem should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings*. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action in rem, and not to provide security in some other proceedings, for example, arbitration proceedings. The time may well come when the law on this point may be changed: see section 26 of the Civil Jurisdiction and Judgments Act 1952 which has however not yet been brought into force. But that is not yet the law. *It follows that, if a plaintiff invokes the jurisdiction of the court to obtain the arrest of a ship as security for an award in arbitration proceedings, the court should not issue a warrant of arrest* ... (Emphasis added.)

[26] The AA 2005 was amended by the 2011 Amendment Act, to extend the High Court's jurisdiction to grant interim relief to include arrest of ships, bail and security in an action in rem under its admiralty jurisdiction for the purpose of providing security for an award which may be made in arbitral proceedings. For the purpose of the extension of the High Court's jurisdiction, the 2011 Amendment Act amended s 11(1)(c) of the AA 2005 by inserting after the word 'dispute', the words 'whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court'. The amendment to s 11(1)(c) of the AA 2005 came into effect on 1 July 2011; it reads as follows (the words inserted by the 2011 Amendment Act are underlined):

> 11 Arbitration agreement and interim measures by High Court
>
> (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:
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> ...
>
> (c) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court.

[27] Section 11(1)(e) of the AA 2005 together with the rest of paras (a) to (h) of s 11(1) were later repealed by the Arbitration (Amendment) Act (No 2) Act 2018 ('the 2018 Amendment Act'). The amended s 11(1) of the AA 2005 reads as follows:

> 11 Arbitration agreement and interim measures by High Court
>
> (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to —

(a) maintain or restore the status quo pending the determination of the dispute;

(b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;

(d) preserve evidence that may be relevant and material to the resolution of the dispute; or

(e) provide security for the costs of the dispute.

[28] As can be seen from s 11(1) above, the High Court's jurisdiction to grant interim relief for arbitral proceedings under its admiralty jurisdiction is preserved in the new s 11(1)(c) of the AA 2005. This is reflected in *Hansard* dated 3 April 2018 at p 70, where the Deputy Minister in Prime Minister's Department explained to Parliament:

> Selain itu seksyen 11 juga *memelihara* peruntukan penting membenarkan penahanan harta oleh Mahkamah Tinggi dalam konteks timbang tara tuntutan maritime dengan menggunakan bidang kuasa MLT nya untuk mengambil jaminan sementara tuntutan maritime diteruskan. (Emphasis added.)

[29] It is clear that the extension of the High Court's jurisdiction to grant interim relief before or during arbitral proceedings under its admiralty jurisdiction, through the amendment to s 11(1)(e) of the AA 2005 by the 2011 Amendment Act, was preserved in the new s 11(1)(c) pursuant to the 2018 Amendment Act.

[30] I am unable to agree with the defendants' argument that this extension of the High Court's power to grant interim reliefs for arbitral proceedings pursuant to its admiralty jurisdiction restricts or confines the High Court's power to grant interim relief under s 11(1)(c) of the AA 2005 to arrests, bail or other security under its admiralty jurisdiction only . From the plain reading of s 11(1) of the AA 2005, as amended by the 2011 Amendment Act and the 2018 Amendment Act, the extension of the High Court's power to arrest ships as security for arbitral proceedings under its admiralty jurisdiction does not cancel or strip its power to grant interim reliefs for arbitral proceedings under its civil jurisdiction. Pursuant to established principles of statutory interpretation, it would be wrong to conclude that the extension of the High Court's jurisdiction to grant interim relief for arbitral proceedings under its admiralty jurisdiction means the removal of its jurisdiction to grant interim relief for arbitral proceedings under its civil jurisdiction, without any express provisions in the AA 2005 to that effect.

[31] For this reason, this court finds that notwithstanding the extension of the High Court's jurisdiction to grant interim relief for the arrest of ships as security for arbitral proceedings under its admiralty jurisdiction, the High Court retains its power to grant interim reliefs under its civil jurisdiction as a means of preserving assets for the purpose of satisfying awards which may be made in arbitral proceedings.

DOES THE POWER CONFERRED BY S 19(2) OF AA 2005 TO ARBITRAL TRIBUNALS TO ORDER INTERIM MEASURES HAVE THE EFFECT OF STRIPPING THE HIGH COURT OF ITS JURISDICTION TO GRANT INTERIM MEASURES UNDER S 11(1) OF AA 2005?

[32] Another argument put forward by the defendants to support their contention that the High Court does not have the jurisdiction to grant a Mareva injunction before or during arbitral proceedings is because the arbitral tribunal is empowered to grant such relief under s 19(2)(c) of the AA 2005.

[33] Section 19 of the AA 2005, as amended by the 2018 Amendment Act, states:

> 19 Power of arbitral tribunal to order interim measures
>
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
>
> (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to —
>
> (a) maintain or restore the status quo pending the determination of the dispute;
>
> (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
>
> (c) provide a means of preserving assets out of which a subsequent award may be satisfied;
>
> (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
>
> (e) provide security for the costs of the dispute.

[34] Without any express provisions to that effect, it would be wrong to impute into the AA 2005 that the power given to arbitral tribunals to grant interim measures in s 19(2) of the AA 2005 replaces or in lieu of the High

Court's powers in s 11(1) of the AA 2005 to grant interim measures before or during arbitral proceedings.

[35] As can be seen from s 19(1) of the AA 2005, an arbitral tribunal's power to grant interim measures, including Mareva injunctions, is subject to the request by one of the parties to the arbitral proceedings and the condition that the parties do not agree otherwise. Whereas, there is no similar condition of 'unless otherwise agreed by the parties' in s 11(1) of the AA 2005 restricting the High Court's power to grant interim reliefs.

[36] The High Court's power to grant interim reliefs pursuant to its civil jurisdiction and its admiralty jurisdiction under the CJA is reflected in s 11(1) of the AA 2005 which states that 'A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to'.

[37] For all the reasons above, I find that the High Court's power to grant interim measures for preserving assets before or during arbitral proceedings is not limited to the arrests of ships, bail or security pursuant to its admiralty jurisdiction. Such power includes the discretion to grant other interim measures pursuant to its civil jurisdiction under the CJA, including the power to grant Mareva injunctions for purposes of preservation of property out of which a subsequent arbitration award may be satisfied before or during arbitral proceedings.

DECISION

[38] Accordingly, I find that this court has the jurisdiction to hear and to decide upon the plaintiff's applications for Mareva injunctions under OS 30, OS 31 and OS 32 against the defendants pending the disposal of the arbitral proceedings between them.

Order accordingly.

Reported by Mohd Kamarul Anwar